IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

RSA No.136 of 2002

Date of Decision : April 18, 2012

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1. Smt. Shankari, widow
2. Smt. Promila Devi, widow
3. Rakesh Kumar, son
4. Prashant Kumar, son
5. Rekha Rani alias Raksha Rani, daughter

Of Hari Krishan.

6. Pushpa Devi, daughter
7. Nirmala Devi, daughter
8. Tripta Devi, daughter
9. Rakesh Kumar, son

Of Telu Ram son of Shiv Ditta

All residents of village Kungrat, Sub Tehsil Haroli, Tehsil and District Una, H.P.

....Appellants.

versus

1. Ramesh Chand, son
2. Rakesh Chand, son
3. Sham Sunder, son
4. Smt. Satya Devi, widow

Of Shri Thakar Dass. All residents of village Kungrat, Sub Tehsil Haroli, Tehsil and District Una, H.P.

...Respondents.

Coram:

The Hon'ble Mr. Justice Sanjay Karol, Judge.

Whether approved for reporting?[1]

For the Appellants : Mr. H.K. Bhardwaj, Advocate.

For the Respondents : Mr. Ajay Sharma, Advocate.

Regular Second Appeal under Section 100 of the Code of Civil Procedure.

Sanjay Karol, Judge(Oral)

This is plaintiffs' Regular Second Appeal filed under Section 100 of the Code of Civil Procedure. Plaintiff's

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[1] Whether reporters of the local papers may be allowed to see the judgment?

Civil Suit No.78/90, instituted on 24th April, 1990, titled as Smt. Shankari and others versus Ramesh Cnand and others, stands dismissed by Sub Judge 1st Class, Court No.2, Una, Himachal Pradesh, in terms of judgment and decree dated 8th October, 1996. Findings of fact, judgment and decree stand affirmed, by the Additional District Judge, Una, Himachal Pradesh, in Civil Appeal No.187/2000/96, titled as Smt. Shankari and others versus Ramesh Chand and others, filed by the plaintiffs. Thus, the present appeal arises out of concurrent findings of fact.

2. Appeal was admitted on the following substantial question of law:

> "Whether the courts below by misreading and misappreciating the documentary as well as oral evidence had reached at unreasonable conclusions?"

3. Suit land measuring 4 Kanals 9 Marlas, situate in village Kungrat, Sub Tehsil Haroli, District Una, H.P., was jointly owned by Shri Telu Ram, predecessor-in-interest of the plaintiffs and Shri Thakur Dass, predecessor-in-interest of the defendants. Vide registered mortgage deed dated 12.5.21, the said land was mortgaged with one Shri Mela Ram. Entry in the revenue record (Ex. P-9) was recorded to this effect. Sometime in the year 1963, one Shri Ram Lok and Shri Thakur Dass, predecessors-in-interest of the defendants, redeemed the said mortgage. Revenue entries (Ex. P-6, P-8 and P-11) are evidently clear to this effect.

Subsequently, in the consolidation proceedings, which took place, under the provisions of Himachal Pradesh Holdings (Consolidation and Prevention of Fragmentation) Act, 1971, this position continued to be reflected in the revenue record. Consolidation proceedings took place prior to the year 1990.

4. Such entries reflecting Shri Ram Lok and Shri Thakur Dass/their successors-in-interest as mortgagees, were assailed by the plaintiffs by way of the present suit, seeking a prayer of declaration that plaintiffs are the owners in possession of the suit land. Suit was filed on 24th April, 1990.

5. Defendants resisted the same, inter alia, on the ground that the mortgage was not got redeemed by Shri Telu Ram and as such entries in their favour, as reflected by the revenue authorities, are legal and in accordance with law.

6. Based on the pleadings of the parties, following issues were framed by the trial Court:

> "1. Whether the plaintiffs are owners in possession of the suit land as alleged? OPP
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> 2. Whether the revenue entries coming to plaintiffs' such interest in the suit land are illegal, null and void as alleged? OPP
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> 3. Whether the suit is not maintainable as alleged? OPD
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> ***4.*** Whether the suit is barred by limitation? OPD

5. Whether the suit is not in accordance with Order 34 CPC as alleged? OPD

6. Whether the suit is without any cause of action? OPD

7. Whether the suit is bad for non-joinder of necessary parties as alleged? OPD

8. Whether the suit is not properly valued? OPD

9. Whether the suit is liable to be dismissed with special costs as alleged? OPD

10. Relief."

5. Plaintiffs' suit, tilted as Smt. Shankari and others versus Ramesh Chand and others, was dismissed by Sub Judge, 1st Class, Court No.2, Una, in terms of judgment and decree dated 8th October, 1996.

6. Noticeably, trial Court held that Shri Telu Ram/his successors-in-interest had not paid any amount either to Shri Ram Lok or Shri Thakur Dass. As such, no fault could be found with the entries as reflected in the revenue record. The Court specifically held that Shri Ram Lok and Shri Thakur Dass, both sons of Pohlo, had paid the money to Shri Mela Ram and got the land redeemed in the year 1963 and at no point in time, did the plaintiffs object to the status of the defendants being reflected in the revenue record, during the consolidation proceedings. Also, plaintiffs' plea that they were in possession of the suit land was found to be false. Significantly, trial Court, after relying upon the decision rendered by the apex Court in *Valliama Champaka Pillai versus Sivathanu Pillai and*

others, (1979) 4 SCC 429, held that in any event suit filed in the year 1990 was barred by limitation, since the mortgage stood redeemed in the year 1963 itself.

7. Such findings, judgment and decree were assailed by the plaintiffs, by way of filing Civil Appeal No.187/2000/96, titled as Smt. Shankari and others versus Ramesh Chand and others, which stood dismissed by Additional District Judge, Una, H.P., in terms of judgment and decree dated 24th December, 2001. Hence, the present appeal.

8. Significantly, lower Appellate Court, after fully appreciating the evidence led by the parties, affirmed the findings of fact, with regard to the defendants' possession over the suit land and predecessor-in-interest of the plaintiffs not having paid any amount for redemption of mortgage either to Shri Mela Ram, Shri Ram Lok or Shri Thakur Dass. The lower Appellate Court also affirmed the findings on the question of limitation.

9. Having minutely examined the record and heard learned counsel for the parties, I am of the considered view that findings of fact, so far as payment of amount of redemption is concerned, are not liable to be interfered with. There is nothing on record to show that payments were made by Shri Telu Ram to any person for redeeming the mortgage. Through the testimonies of the relevant witnesses and the revenue record, it stands established

that in fact Shri Ram Lok and Shri Thakur Dass had redeemed the mortgage by making payment to Shri Mela Ram and that the defendants, through their predecessor-in-interest are in possession of the suit land. In fact, Shri Telu Ram is stated to have died in the year 1971. During his life time, he did not take any action for getting the entries verified or recorded in his name. Had he paid any amount, he would have definitely taken some action in this regard. Also, plaintiffs have not placed any documentary proof to substantiate their plea. In fact, plaintiffs were young/minor in the year 1971. In any event, it is not their case that in fact they had paid the amount for redeeming the mortgage. Hence, on this count, I see no reason to differ with the concurrent findings of fact returned by the Courts below.

10. Coming to the question of limitation, I find that the law laid down in *Valliama Champaka Pillai (supra),* the judgment referred to and relied upon by the Courts below, now stands distinguished and explained by the apex Court in *Krishna Pillai Rajasekharan Nair (Dead) by LRs versus Padmanabha Pillai (Dead) by LRs and others, (2004) 12 SCC 754*, wherein it has been so held:

> 16. It is to be noted that the limitation for a suit for contribution would become relevant only when the redeeming co-mortgagor sues the non-redeeming co-mortgagor for enforcing the latter's obligation to make contribution; a suit filed by a co-owner-cum-co-mortgagor for partition and separate possession against the redeeming co-mortgagor and subject to payment of contribution would remain a suit

for partition though the defendant in possession of the property would be justified in insisting that property was not liable to be partitioned unless the plaintiff contributed his share of the money paid for redemption and incidental expenses. To the latter case, wherein the suit has been filed; not by the party claiming contribution but the right to claim contribution was being set up only as defence in equity, the limitation provided for filing a suit for contribution cannot apply.

20. Subrogation rests upon the doctrine of equity and the principles of natural justice and not on the privity of contract. One of these principles is that a person, paying money which another is bound by law to pay, is entitled to be reimbursed by the other. This principle is enacted in S. 69 of the Contract Act, 1872. Another principle is found in equity: "he who seeks equity must do equity". (See Rashbehary Ghose on Law of Mortgage in India, Seventh Edition, 1997. at p. 461).

21. The present one is a case of subrogation by the operation of law and hence governed by the first para of S. 92 of the Transfer of Property Act. The provision recognises the same equity of reimbursement as underlies S. 69 of the Indian Contract Act that "a person who is interested in the payment of money, which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other". Such a payment made, carries with it, at times, an equitable charge. Section 92 of the Transfer of Property Act does not have the effect of a substitutee becoming a mortgagee. The provision confers certain rights on the redeeming co-mortgagor and also provides for the remedy of redemption, foreclosure and sale being available to the substitutee as they were available to the substituted. These rights the subrogee exercises not as a mortgagee reincarnate but by way of rights akin to those vesting in the mortgagee. The co-mortgagor can be a co-owner too. A property subject to mortgage is available, as between co-mortgagors for partition, of course, subject to adjustment for the burden on the property. One of the co-mortgagors, by redeeming the

> mortgage in its entirety, cannot claim a right higher than what he otherwise, had faced with a claim for partition by the other co-owner. He cannot defeat the legal claim for partition though he can insist on the exercise of such legal right claimed by the other co-owner-cum-co-mortgagor being made subject to the exercise of the equitable right to claim contribution vesting in him by subrogation.
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> 22. In our opinion, the suit filed in the present case being a suit for partition primarily and predominantly and the relief of redemption having been sought for only pursuant to the direction made by the High Court in its order of remand, the limitation for the suit would be governed by Art. 120 of Limitation Act, 1908. For a suit for partition the starting point of limitation is - when the right to sue accrues, that is, when the plaintiff has notice of his entitlement to partition being denied. In such a suit, the right of the redeeming co-mortgagor would be to resist the claim of non-redeeming co-mortgagor by pleading his right of contribution and not to part with the property unless the non-redeeming co-mortgagor had discharged his duty to make contribution. This equitable defence taken by the redeeming co-mortgagor in the written statement would not convert the suit into a suit for redemption filed by the non-redeeming co-mortgagor."

11. Consequently, findings with regard to the question of suit otherwise being barred by limitation are reversed.

12. Substantial question of law is answered accordingly.

For the foregoing reasons, present appeal is disposed of. Pending application(s), if any, also stand disposed of.

(Sanjay Karol),

April 18, 2012(sd) Judge.